

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**Recology Hay Road<sup>1</sup> and Teamsters Local 315, Petitioner.** Case 20–UC–191943

February 27, 2019

**DECISION ON REVIEW AND ORDER**

BY CHAIRMAN RING AND MEMBERS KAPLAN  
AND EMANUEL

The issue presented in this case is whether the Regional Director properly clarified the existing unit of certain of the Employer's employees who work at its solid waste disposal facility in Vacaville, California, to include two material receiving coordinators (MRCs).

On October 25, 2017, the Regional Director issued a Decision and Order Clarifying Bargaining Unit<sup>2</sup> in which she granted the Petitioner's petition for unit clarification with respect to the MRCs, finding that they are an accretion to the existing unit.<sup>3</sup> Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review contending that the Regional Director misapplied the Board's traditional accretion standard. The Petitioner filed an opposition to the request.

On February 13, 2018, the Board granted the Employer's request for review and invited briefing on whether the Regional Director's finding that the Employer's MRCs constitute an appropriate accretion to the bargaining unit is consistent with the standard articulated in *Safeway Stores, Inc.*, 256 NLRB 918 (1981). Thereafter, the Employer and Petitioner filed briefs on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. Having carefully considered the entire record in this proceeding, including the briefs on review, for the reasons stated below, we reverse the Regional Director's clarification of the bargaining unit to include the MRCs, and we dismiss the petition.

**I. FACTS**

The Employer operates a solid waste disposal facility in Vacaville, California. The Petitioner represents a unit of employees employed at the Employer's facility in the classifications of weighmaster, equipment operators, equipment servicers, spotter/traffic control/load checker, and landfill laborers.<sup>4</sup> The parties have a longstanding

bargaining relationship, and the current collective-bargaining agreement is effective from October 1, 2016 through September 30, 2021.

The MRC position was created in late 2016, with two employees hired into that position beginning work on November 1. The Petitioner states that it first learned of this position on approximately December 13, 2016. The Employer has at all times maintained that this position is not covered by the parties' collective-bargaining agreement.

All bargaining unit employees and the MRCs work in the yard of the Employer's facility and assist customers with debris disposal. Upon entry into the yard, customers first stop at the scale house where the weighmaster inspects and weighs the contents of their load. The weighmaster prepares a weight ticket and collects payment for the appropriate dumping fees. The weighmaster then directs the customer to the correct disposal area. About 200 yards away, and before reaching the disposal areas, the customer must stop at a yellow observation tower manned by a MRC. The MRC verifies the accuracy of the customer's weight ticket by comparing the contents of the load with the type of debris listed on the ticket. The MRC uses an 8-foot platform and mirrors on an extended rod to inspect the load. If the MRC confirms that all debris is accounted for on the weight ticket, the MRC directs the customer on to the appropriate disposal area. If the MRC finds an error with a customer's weight ticket, such as additional waste not listed on the ticket, the MRC informs the weighmaster of the error so that appropriate fees may be collected and records the discrepancy in a log.<sup>5</sup> Following the MRC's inspection, the customer proceeds three-quarters of a mile to the appropriate disposal area. A spotter directs customer traffic within the disposal area, informing customers where their debris is to be discarded and ensuring customers follow safety procedures while unloading debris. The MRC will communicate with the spotter to confirm whether a customer is dumping a specific type of debris in order to ensure the correct waste is recorded on the log. MRCs and spotters are trained on the Employer's load-check program and hazardous waste procedures.

MRCs do not perform work in other classifications or vice versa, and there is no history of transfers between the MRC position and any bargaining unit position. However, there is daily interaction and communication between the MRCs, weighmasters, and spotters. All bargaining unit employees and MRCs wear an Employer-

subclassifications). No party directly disputes these findings, although the parties' filings indicate there may be fewer employees in the unit, and the Employer has indicated that there may be some additional classifications in the unit. It is unnecessary to resolve these matters to decide this case.

<sup>5</sup> The site supervisor and other management officials review the log to determine whether disciplinary action should be taken against the Weighmaster.

<sup>1</sup> The Employer's name appears as corrected.

<sup>2</sup> Dates are in 2017 unless otherwise noted. The Regional Director subsequently issued an erratum, also dated October 25, correcting the date for filing a request for review of her decision.

<sup>3</sup> The Regional Director clarified the unit based on an administrative investigation. Neither party contends there should have been a hearing in this case.

<sup>4</sup> The Regional Director's Decision describes the unit as consisting of about 41 employees across seven classifications (and additional

provided uniform, including a safety vest or reflective top, work boots, and a company shirt. They also share a break room and clock in and out in the same manner.

Bargaining unit employees are paid pursuant to the parties' collective bargaining agreement at an hourly rate based on their classification. Their pay ranges from \$16.19 to \$27.61 per hour. Their benefits include paid holidays, a pension plan, and health insurance. MRCs are paid at an hourly rate of approximately \$16.50. They receive medical, dental, and vision health benefits, as well as life insurance benefits, through the Employer; these benefits differ from those received by bargaining unit employees. Both unit employees and MRCs are directly supervised by the Employer's site supervisor and generally supervised by its general manager. The Employer does not require any specific educational degrees or certificates as prerequisites to hold a bargaining unit position or a MRC position.

According to the Employer, the MRC position was created in response to two theft schemes perpetrated by unit employees: one involving weighmasters not issuing weight tickets in exchange for cash kickbacks; the other involving a unit foreman falsifying weight tickets in exchange for cash kickbacks. The Employer estimates that these schemes amounted to an approximately \$2 million revenue loss for the Employer and resulted in the termination of several unit members involved in the schemes. The Employer asserts, without dispute, that, to protect itself against such theft during business hours, it created the MRC position outside of the bargaining unit to serve as management's "eyes and ears" by observing and reporting weighmasters' infractions.<sup>6</sup>

## II. THE REGIONAL DIRECTOR'S DECISION

Citing *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270 (2005), *enfd.* 181 Fed.Appx. 85 (2d Cir. 2006), *Safeway Stores*, above, and *E. I. Du Pont de Nemours, Inc.*, 341 NLRB 607 (2004), the Regional Director began her analysis by noting that the Board permits accretion only when the employees a party seeks to add to the existing bargaining unit have little or no separate identity and where the two groups share an overwhelming community of interest. The Regional Director acknowledged that in determining whether this standard has been met, the two "critical" factors are employee interchange and common day-to-day supervision. The Regional Director then found that there is evidence of common supervision here and that although the MRCs do not have "significant interchange" with other members of the bargaining unit, there is evidence of daily contact and functional integration between the MRCs and the weighmasters and spotters. Relatedly, in finding

that the MRCs work in close geographic proximity to the bargaining unit employees, the Regional Director noted that the MRCs are "integral" to the bargaining unit employees' work and serve as a "second link in the [Employer's] operational chain." Finally, the Regional Director found that the MRCs have almost identical working conditions and the same basic skills, functions, and education requirements as bargaining unit employees. The Regional Director accordingly concluded that the MRCs share an overwhelming community of interest with the bargaining unit employees.

## III. ANALYSIS

"When the Board finds an accretion, it adds employees to an existing bargaining unit without conducting a representation election. The purpose of the accretion doctrine is to 'preserve industrial stability by allowing adjustments in bargaining units to conform to new industrial conditions without requiring an adversary election every time new jobs are created or other alterations in industrial routine are made.'" *NV Energy, Inc.*, 362 NLRB 14, 16 (2015) (quoting *NLRB v. Stevens Ford*, 773 F.2d 468, 473 (2d Cir. 1985)). "However, because accreted employees are added to the existing unit without an election or other demonstration of majority support, the accretion doctrine's goal of promoting industrial stability is in tension with employees' Section 7 right to freely choose a bargaining representative." *Id.* The Board accordingly follows a restrictive policy in applying the accretion doctrine. See *CHS, Inc.*, 355 NLRB 914, 916 (2010) (quoting *Archer Daniels Midland Co.*, 333 NLRB 673, 675 (2001)); *Super Valu Stores*, 283 NLRB 134, 136 (1987).

Under the well-established accretion standard set forth in *Safeway Stores*, the Board finds "a valid accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit and when the additional employees share an overwhelming community of interest with the preexisting unit to which they are accreted." 256 NLRB at 918 (footnotes omitted). See also *E. I. Du Pont*, *supra* at 608. In determining whether this standard has been met, the Board considers factors including interchange and contact among employees, degree of functional integration, geographic proximity, similarity of working conditions, similarity of employee skills and functions, supervision, and collective-bargaining history. See *id.* (citing *Archer Daniels Midland*, *supra*).<sup>7</sup> The Board recognizes that "the normal situation presents a variety of elements, some militating toward and some against accretion, so [] a balancing of the factors is nec-

<sup>6</sup> The Employer does not, however, specifically contend that the MRCs are "guards" within the meaning of Sec. 9(b)(3) of the Act. Although the Employer suggests that the MRCs are "guard-like," we do not pass on their 9(b)(3) status.

<sup>7</sup> The Board distinguishes between two types of employee interchange—temporary transfers and permanent transfers—and it regards temporary transfers as more important than permanent transfers when analyzing whether accretion is appropriate. *NV Energy*, *supra*, at 17 fn. 9 (citing cases).

essary.” *E. I. DuPont*, supra at 608 (quoting *Great A & P Tea Co. (Family Savings Center)*, 140 NLRB 1011, 1021 (1963)). However, the Board has held that the “two most important factors—indeed, the two factors that have been identified as critical to an accretion finding—are employee interchange and common day-to-day supervision,” and therefore “the absence of these two factors will ordinarily defeat a claim of lawful accretion.” *Frontier Telephone*, supra at 1271 fn. 7 (internal quotations omitted).<sup>8</sup> The burden to show that accretion is appropriate is “heavy” and it falls on the requesting party. *NV Energy*, supra at slip op. 6. Here, that party is the Petitioner.

Contrary to the Regional Director, we find that the Petitioner has not satisfied its heavy burden of establishing that accretion is appropriate because the MRCs have at least some separate identity and, moreover, do not share an overwhelming community of interest with the bargaining unit employees.

First, the MRCs have at least some separate group identity. They perform a new job function—reviewing weight tickets issued by the weighmasters—that was added to prevent theft and costly errors made by unit employees. Unlike unit employees, they work on an observation tower, which was installed specifically to enable the MRCs to perform this review function, and they also use distinctive equipment (mirrors on extended rods) to perform this function. When the MRCs discover an error in a customer’s weight ticket, they take action, informing the weighmaster of the error, and then record the discrepancy in a log; a supervisor or manager then reviews the log to determine whether disciplinary action should be taken against the offending weighmaster. Before the Employer created the MRC position, none of its employees verified that the weighmasters completed a weight ticket for each incoming public vehicle or ensured that the tickets accurately characterized the type of debris in the vehicle, nor were any employees specifically tasked with detecting and reporting discrepancies. Furthermore, the health insurance benefits and retirement package the MRCs receive from the Employer are different from those received by bargaining unit employees.<sup>9</sup> Upon this evidence, we find that the MRCs have at least some separate identity from bargaining unit employees.

Second, we find that the available evidence does not establish that the MRCs share an overwhelming community of interest with the employees in the existing unit. While we agree with the Regional Director that some

factors support accretion here—e.g., common day-to-day supervision, integration of operations, and some shared miscellaneous terms and conditions of employment<sup>10</sup>—this evidence is not sufficient to find an *overwhelming* community of interest between the MRCs and bargaining unit employees.

Crucially, there is no evidence of permanent or temporary interchange between the MRCs and the bargaining unit employees. See generally *Combustion Engineering*, 195 NLRB 909, 912 (1972) (stating that “[t]he absence, or infrequency, of interchange of employees is probably the one factor most commonly relied upon by the Board in finding no accretion” and collecting cases). The Regional Director’s factual findings establish that the MRCs do not perform work in other classifications or vice versa, and her investigation did not disclose any history of transfer between the MRC position and any bargaining unit position.<sup>11</sup> Thus, this is not, as the Regional Director found, a situation where MRCs lack “significant interchange” with unit employees; rather, this is a situation where there is no evidence of any interchange, whether temporary or permanent, and the complete absence of this “critical” factor weighs heavily against an accretion finding. *Frontier Telephone*, supra at 1271 fn. 7. Contrary to the Regional Director’s apparent suggestion, this lack of interchange is not offset by daily contact and functional integration between the MRCs and bargaining unit employees. Although there is no dispute that there is some functional integration and contact here, functional integration is a factor independent from interchange,<sup>12</sup> and employee “contact” alone does not constitute interchange.<sup>13</sup>

Additionally, we do not agree with the Regional Director’s finding that the MRCs and bargaining unit employees have “almost identical” working conditions and functions. Although it is clear that the MRCs perform some functions similar to those of the weighmasters and spotters, the MRCs “have at least some additional duties and work under [] different expectations.” *NV Energy*, supra

<sup>10</sup> MRCs and unit employees have the same uniforms, share a break room, and clock in and out in the same manner.

<sup>11</sup> We note that the absence of interchange appears quite intentional given that the Employer purposefully established the new MRC classification to prevent theft and costly errors by other employees.

<sup>12</sup> See, e.g., *Passavant Retirement & Health Center, Inc.*, 313 NLRB 1216, 1218–1219 (1994) (Board dismissed unit clarification petition where critical factors were missing, disagreeing with regional director’s explanation that “functional integration . . . diminishes the significance of the lack of regular interchange between” employees); *Courier Dispatch Group*, 311 NLRB 728, 731 (1993) (Board affirmed acting regional director’s decision finding accretion inappropriate where, inter alia, although the employer’s “evidence establishe[d] some functional integration . . . it d[id] not clearly establish the critical factor of employee interchange”).

<sup>13</sup> See, e.g., *Levitz Furniture Corp.*, 224 NLRB 347, 349 fn. 10 (1976) (Board “did not regard” warehousemen’s participation in delivery “activities [] as constituting temporary employee interchange” even though warehousemen came into “some contact with [unit] employees”).

<sup>8</sup> *Frontier Telephone* dealt with accretion in an unfair labor practice setting, hence the reference to a “lawful” accretion, but the same analysis applies to alleged accretions in unit clarification proceedings.

<sup>9</sup> The Regional Director’s findings regarding benefits are somewhat unclear, but she acknowledged that there are, in fact, differences between the MRCs’ and bargaining unit employees’ benefits. Any absence of evidence on this count is construed against the Petitioner, as the party requesting accretion here. See, e.g., *NV Energy*, supra (party favoring accretion bears a “heavy” burden) (citing cases).

at slip op. 5. Specifically, weighmasters serve as the Employer's initial point-of-contact for customers. Customers make their first stop at the Employer's scale house where the weighmaster inspects and weighs their waste load, then prepares a weight ticket and collects payment. Immediately thereafter, customers must undergo a second, separate inspection at a newly-created observation tower. The purpose of this second inspection is entirely different from the weighmasters' inspection, as the MRCs are not identifying the type and weight of debris in order to collect payment; instead, their primary function is to perform a critical review of bargaining unit employees' work by using distinctive equipment to identify and correct discrepancies made by weighmasters in ensuring all of the customers' debris is accounted for. When the MRCs identify an error on a customer's weight ticket, they inform the weighmaster and record the discrepancy in a log that is reviewed by managers for the purpose of determining whether to discipline the weighmaster.

Finding an overwhelming community of interest is particularly unwarranted in light of the MRCs' primary "review and report" function, which is not performed by any other bargaining unit employees.<sup>14</sup> The Board has found employees with similar job functions have "markedly different interests" from unit employees sufficient to warrant their exclusion from the unit. Cf. *Virginia Mfg. Co.*, 311 NLRB 992, 992–993 (1993) (production control clerk excluded from production and maintenance unit where "certain of his monitoring duties have the potential of placing him in an adversarial position" to production employees and "lead[] them to consider [the production control clerk] to be more aligned with management's interest than with theirs").

Thus, the adversarial nature of the MRCs' monitoring and reporting function further buttresses our finding that they do not share an overwhelming community of interest with bargaining unit employees. *Id.* Finally, as indicated above, although there are some shared terms and conditions of employment, the MRCs and bargaining unit employees have at least some differences in benefits.

Based on the foregoing, we find that the Petitioner has not satisfied its heavy burden of establishing that an overwhelming community of interest exists here, particu-

larly given the complete absence of the "critical" factor of interchange.<sup>15</sup>

In sum, under the standard articulated in *Safeway Stores*, an accretion finding is unwarranted here because the Petitioner has not established that the MRCs have little or no separate group identity, nor has the Petitioner shown they share an overwhelming community of interest with bargaining unit employees. We therefore reverse the Regional Director's decision.

#### ORDER

The Regional Director's Decision and Order Clarifying Bargaining Unit is reversed and the petition is dismissed.

Dated, Washington, D.C. February 27, 2019

---

John F. Ring, Chairman

---

Marvin E. Kaplan, Member

---

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

---

<sup>15</sup> The Regional Director did not address the parties' collective-bargaining history other than to identify the effective dates of the current collective-bargaining agreement, describe the bargaining unit, and state that the parties have been unable to agree on the inclusion of the MRC position in the bargaining unit. Without more information, we cannot properly evaluate this factor and thus have not considered it in our analysis.

---

<sup>14</sup> Further, although the MRCs and unit employees all work in the employer's yard, the MRCs have their own defined work area separate from those of the other employees. The MRC observation tower is about 200 yards from the weighmasters' scale house, and three-quarters of a mile from the disposal areas where the spotters work. Under these facts, we do not regard geographic proximity as supporting finding an overwhelming community of interest. See generally *At Wall Co.*, 361 NLRB 695, 698 (2014) (finding no accretion where additional employees, *inter alia*, "largely stay[ed] in their own work areas," which were "separate (although contiguous)").